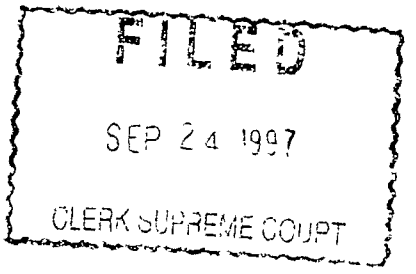
IN THE COURT OF APPEALS OF IOWA 000501

No. 7-167 / 96-1055
Filed September 24, 1997



STATE OF IOWA,
Appellee,

vs.

MICHAEL CORBIN ROUSE,
Appellant.

Appeal from the Iowa District Court for Boone County, Joel E. Swanson, Judge.

Defendant appeals from judgment and sentence entered, following a jury trial, for first-degree murder, in violation of Iowa Code section 707.2 (1995). **AFFIRMED.**

Alfredo Parrish of Parrish, Kruidenier, Moss, Dunn & Montgomery, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Steven J. Oeth, County Attorney, for appellee.

Heard by Sackett, P.J., Streit, J., and Habhab, S.J.* but decided by Sackett, P.J., and Huitink and Streit, JJ.

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

STREIT, J.

Defendant appeals from judgment and sentence entered, following a jury trial, for first-degree murder. He claims the trial court erred in: (1) not suppressing evidence of weapons present at the crime scene but not used in commission of the offense; (2) allowing the State to cross-examine defendant regarding suppressed evidence; and (3) limiting defendant's cross-examination of a State's witness.

I. Background and Facts.

Michael Rouse was charged with first-degree murder after killing Patrick Pepples with a shotgun blast to the chest. Rouse claimed the slaying was done in self-defense. He filed a motion to suppress all evidence found at the murder scene, including two black-powder guns, a cross-bow, and a shotgun. The court sustained Rouse's motion as it pertained to black-powder gun found under a pillow. It ruled the other black-powder gun and the shotgun murder weapon were found in plain view (it did not specifically address the cross-bow). Rouse filed motions in limine to exclude evidence of the two black-powder guns and the cross-bow on relevancy grounds because there was no evidence they were used in the commission of the offense. The court denied the motions in limine to the same extent as the motion to suppress. The court also denied Rouse's motion to quash the State's subpoena duces tecum of a letter Rouse had written to his mother.

A jury trial commenced on May 15, 1996. Rouse testified Pepples came into his apartment and demanded his prescription morphine medication. Rouse shot Pepples

during a struggle. The jury found Rouse guilty of first-degree murder. The court sentenced Rouse to life imprisonment. Rouse appeals.

Defendant contends the trial court denied his right to a fair trial under the Fifth Amendment and article one, sections 9 and 10, of the Iowa Constitution in: (1) failing to suppress evidence of the other weapons not used in the commission of the offense; (2) allowing the State to cross-examine defendant regarding suppressed evidence; and (3) limiting defendant's cross-examination of a State's witness.

The State argues there are several error preservation issues. The State contends the only relevancy claims preserved were the actual admission of the unsuppressed black-powder gun, and testimony about the suppressed black-powder gun. The State argues the Fifth Amendment claim regarding the suppressed gun and any Fourth Amendment claims regarding the suppressed gun were not preserved.

II. Preservation of Constitutional Claims.

Rouse claims he was denied a fair trial under the Fifth Amendment and article one, sections 9 and 10, of the Iowa Constitution, therefore, review is de novo. The State claims Rouse did not preserve any constitutional claims, thus review of the district court's evidentiary rulings is for abuse of discretion.

Claims of constitutional errors must be preserved in the same manner as any other claims. *State v. Rinehart*, 283 N.W.2d 319, 324 (Iowa 1979) *cert. denied*, 444 U.S. 1088, 100 S. Ct. 1049, 62 L. Ed. 2d 775 (1980) (failure to preserve denial of due process claim precludes application of discretionary plain error rule). The introduction

of weapons into evidence was not objected to on constitutional grounds at the trial level, nor was the issue of cross-examining the defendant on suppressed evidence, or limiting defendant's right to cross-examine a State's witness. Matters not raised in the trial court, including constitutional questions, cannot be effectively asserted for the first time on appeal. *State v. Lyon*, 223 N.W.2d 193, 194 (Iowa 1974). Therefore, our review is for abuse of discretion instead of de novo.

*A. **Unsuppressed Evidence.*** The State presented evidence of the location of the unsuppressed black-powder gun and cross-bow, and the dangerous characteristics of the black-powder gun. The State's closing arguments urged the black-powder guns and the cross-bow showed Rouse's "state of mind and what [he] thinks and how he views life." Defendant argues the black-powder gun and cross-bow were not involved in the murder, had no tendency to establish guilt or innocence of the defendant, and should have been excluded by the trial court.

"An instrumentality in a defendant's possession or available to him, even when not identified as having actually been used in the crime charged, may be received in order to complete the picture of the circumstances surrounding the event." *State v. Nowlin*, 244 N.W.2d 596, 602 (Iowa 1976). The unsuppressed black-powder gun, cross-bow, and shotgun murder weapon, were in plain view when police arrived at the murder scene. These weapons were in defendant's possession and available to him at the time of the murder. This evidence merely tells the whole story of this fatal evening. To take these facts out of the tale told by the witnesses would unduly distort the facts.

Defendant cites the authority *State v. Wallace*, 145 N.W.2d 615 (Iowa 1966), for the proposition that the cross-bow and black-powder gun which were in the officer's plain view are not admissible because there was no evidence linking these weapons to the commission of the crime. The factual differences between this case and *Wallace* frustrates the defendant's reliance on the case for this proposition. In *Wallace* the defendant was charged with kidnaping. Neither the complaining witness nor the arresting officers mentioned or inferred there was any threat to use a shotgun or any other weapon in the perpetration of the kidnaping. The gun which the defendant sought to suppress was discovered by officers in a context much different than the one we have here. Officers, who arrested the defendant for kidnaping, searched the defendant's vehicle, with no search warrant and no consent from anyone. When exploring the rear of the car, they pulled the back seat forward and found a sawed off shotgun. The appellate court held that the gun was irrelevant and granted the defendant a new trial.

In this case, three weapons, other than the shotgun murder weapon, were at issue: a crossbow and two black-powder guns. The crossbow was attached to the defendant's walker. One black-powder gun was on the defendant's dresser and the other was hidden under a pillow. The trial court admitted the cross-bow and the gun which were in plain view, but excluded the hidden black-powder gun. In *Wallace,* the gun was not relevant because there was never any threat, attempt by the defendant or anyone else to at any time, in any manner, use a shotgun or any other weapon in the perpetration of the kidnaping. The cross-bow and black-powder gun here are relevant

because they show not only the preparation and state of mind of the defendant but also constitute part of the picture at the crime scene. The shotgun in *Wallace* was not in plain view at the scene of the crime as the admitted weapons here were. These are crucial differing facts.

Even when evidence is found relevant, the offered evidence is subject to the test of policy consideration. *Id.* at 618. When the danger of unfair prejudice outweighs the probative value of the relevant evidence, the evidence may be excluded. Iowa R. Evid. 403 (West 1997). When a Rule 403 balancing is done in this case, the unfair prejudice which may have occurred did not outweigh the probative value of this evidence. Possession or ownership of guns does not carry the prejudicial weight or force it may have. Today, it is quite common for people to own several guns, and the admission of weapons owned by a defendant is less likely to inflame the jury. The trial court did not err in admitting the black-powder gun and cross-bow or rule contrary to the supreme court's holding in *Wallace*.

B. Suppressed Evidence. Rouse testified at trial he owned one black-powder gun, a shotgun, and a cross-bow, and used them for hunting, target practice, and personal protection.[1] The State claimed Rouse's testimony was false or so misleading

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[1] During direct examination defendant was asked the following questions by his attorney:

Q. Okay. Now, Michael, you do own a couple of weapons; don't you?
A. Yes, sir, I do.
Q. And tell me what weapons you own.
A. I own, well, that cross-bow and the .44 and that 12-gauge shotgun.
* * *

as to be the equivalent of a falsehood because Rouse also owned the black-powder gun found under his pillow and did not mention it.

The trial court admitted into evidence, over defense counsel's objection, the suppressed black-powder gun. The court determined Rouse had "opened the door" to the suppressed black-powder gun during his testimony, and allowed the State to question Rouse about it. Rouse claims on appeal he testified truthfully to all questions asked of him, therefore evidence of the suppressed black-powder gun should not have been allowed to have been used by the State to impeach his testimony.

"[W]here the suppressed evidence circumstantially contradicts defendant's testimony alone and directly contradicts it when interpreted by testimony introduced by the defendant as part of his trial strategy, sufficient contradiction exists to warrant use of the suppressed evidence for impeachment purposes. *See State v. Campbell,* 294 N.W.2d 803, 807 (Iowa 1980) (court allowed the suppressed results of a breath test to be admitted after defendant testified he had two or three drinks that night and offered a physician's testimony to explain the physiological effects of such consumption). Evidence which has been suppressed is admissible to impeach a false statement made by the defendant in his direct testimony. *Id.*

Rouse raised the issue of how many weapons he owned. The suppressed loaded black-powder gun found under Rouse's pillow directly contradicts his testimony the

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Q. Okay. Now you had said you did target shooting with the .44?
A. With that .44 pistol, that black-powder gun.

weapons he owned were the .44, a shotgun, and cross-bow. His testimony was offered to show he did not own the weapons with the intent of killing someone, but rather they were for target practice and personal protection to support his self-defense theory. The fact the suppressed black-powder gun was found loaded under his pillow contradicts defendant's trial strategy. The district court did not abuse its discretion by admitting the suppressed gun to impeach the defendant on cross-examination.

C. Cross-Examination Within Scope of Direct. The State called defendant's mother, Audrey Rouse, as a witness. The State asked her about one specific phone call she received from Rouse from jail. She testified her son did not claim the shooting was an accident. On cross-examination, Rouse's trial counsel asked her about other communications she had with Rouse in which he told her it was an accident. The court sustained the State's objection the question exceeded the scope of direct-examination. *See* Iowa R.Evid. 611(b) (West 1997)("cross-examination should be limited to the subject matter of the direct examination. . . .). Rouse argues because defense counsel was unable to fully cross-examine defendant's mother as to other conversations between her and defendant, the jury was left with the false impression defendant never told his mother the shooting was accidental. *See* Iowa R. Evid. 106(a) (West 1997) (when an act, declaration, conversation, . . . or part thereof, is introduced by a party, any other part or any other act, declaration [or] conversation . . . is admissible when necessary in the interest of fairness, a clear understanding, or an adequate explanation).

Although Rouse should have been able to complete the picture, the district court's ruling did not deny him the opportunity to call his mother in his own case and stated Rouse could call her to testify. The court acted within its discretion in ruling Rouse's question went beyond the scope of the State's direct examination.

II. Ineffective Assistance of Counsel.

The State used a letter written by Rouse to his mother and then given to his attorney to impeach Rouse. Rouse argues he was denied effective assistance of counsel because counsel did not object to its offer into evidence.

Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *State v. Capper*, 539 N.W.2d 361, 367 (Iowa 1995). However, they may be resolved on direct appeal when the record adequately addresses the issues. *Davis v. State*, 520 N.W.2d 319, 321 (Iowa 1994). Where it is alleged that constitutional rights have been denied, we make an evaluation of the totality of the circumstances, which amounts to a de novo style review. *State v. Showalter*, 427 N.W.2d 166, 168 (Iowa 1988).

The defendant bears the burden of proving by a preponderance of the evidence he received ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). He must prove two elements: (1) counsel failed to perform an essential duty; and (2) he was prejudiced by counsel's omission. *Id.* at 563-64. The test for the first element is whether the attorney's performance was outside the range of normal competency. *Id.* at 564. The test for the second element is whether there is a

reasonable probability that, but for his trial attorney's unprofessional errors, the resulting conviction and sentence would have been different. *Id.* A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process the trial cannot be relied on as having produced a just result. *Id.*

Rouse argues whether it violates Iowa Rule of Criminal Procedure 13(3)(a) to allow the State to compel a defendant to produce his own statements is a case of first impression in this state.[2] If it is, we will not find defendant's counsel ineffective. Defendant's counsel cannot be held to foresee what an Iowa court will hold on a case of first impression. *See Snethen v. State*, 308 N.W.2d 11, 16 (Iowa 1981). Whether this is a violation of Iowa Rule of Criminal Procedure 13(3)(a) shall be discussed when it arises before us based on the merits. Rouse's counsel was not ineffective on this issue.

Rouse also argues his trial counsel was ineffective for failing to object to testimony of the weapons owned by defendant but not used in the commission of the offense; for failing to move to recuse the trial judge or object to the trial court's

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[2] Iowa Rule of Criminal Procedure 13(3)(a) is a discovery rule which allows the court, "upon motion of the state, order the defendant to permit the state to inspect and copy books, papers, documents, statements other than those of the accused, photographs or tangible objects, which are not privileged and are within the possession, custody or control of the defendant and which the defendant intends to introduce in evidence at trial."

preferential treatment of the State; and, for failing to object to a witness who was not listed in the minutes of testimony.

We have already discussed testimony of the weapons owned by the defendant and found they were admissible. Officer Ahrens was called by the State to testify even though his name did not appear in the minutes of testimony. His testimony established the chain of custody for the unsuppressed black-powder gun and the victim's coat found at the scene of the crime. Rouse claims these where key pieces of evidence and counsel's failure to object to the testimony of this witness denied him of a fair trial. These items had already been admitted into evidence before Officer Ahrens testified. There had already been extensive testimony about both items. We find counsel was not ineffective on either issue.

Finally, Rouse claims his trial counsel failed to move for the recusal of the trial judge. We have reviewed the record and do not find grounds for such action. Counsel was not ineffective on this issue. The defendant was not deprived of a fair and impartial trial.

AFFIRMED.